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Bina Goodyear Bhd v Ambank (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 26NCC-110–11 OF 2013
ABU BAKAR JAIS JC
15 JANUARY 2014

Companies and Corporations — Restraining order — Application for — Restraint proceedings in any action against company except with leave of court — Proposal of debt settlement through proposed scheme of arrangement — Proposed scheme of arrangement approved by creditors — Whether there was need for restraining order — Companies Act 1965 s 176(10)

The applicant's application was for restraining order ('the RO') for 90 days under s 176(10) of the Companies Act 1965 ('the Act') to restrain proceedings in any action against the company except with the leave of the court. The applicant had obtained an order of the court pursuant to s 176(1) of the Act to propose a debt settlement through a proposed scheme of arrangement ('the PSA'). This PSA had been presented to the company's creditors and majority of these creditors had agreed to the terms of the PSA. Having obtained the consent of majority of the creditors, the applicant applied for the first RO but two creditors, namely Ambank (M) Bhd and Boon Wah Air Conditioning Engineering Sdn Bhd objected to this application and this application was dismissed by the court. The applicant proceeded to appealed to the Court of Appeal but the same dismissed the appeal as it was decided the provisions of s 176(10A)(c) and (10A)(d) of the Act were not adhered to. The applicant then applied for the second RO and this was granted. It was the applicant's submission that there was a need for the RO now as although the PSA was approved by the creditors, the applicant needed time to ensure the projects that would be obtained under the proposed regularisation plan ('the PRP'). Without this, the PRP could not be submitted to Bursa. Towards this end, various relevant e-mails were exhibited by the applicant showing efforts in ensuring the projects for the PRP. Efforts were made also with regard to the appointment of relevant parties in preparing for the submission to Bursa. These efforts included the appointment of solicitors and accountants for due diligence exercise and these efforts was still on-going. The appointment of a director to satisfy the requirement of s 176(10A)(d) of the Act was also finalised. The consent and support of the majority creditors were obtained for the application of the RO and the appointment of the director.

Held, allowing the application:

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(1) The application was not an extension of an RO but a fresh application of the same. This was clearly seen in the OS as filed by the applicant with the words 'tempoh lanjutan' (extended time) deleted. The court had ordered that those words be deleted (see para 15).

(2) There is indeed a viable PSA and PRP that ought to be considered favourably and rightly pursued by the applicant. The PSA and PRP would not only be for the benefit of the applicant but to the creditors as a whole and therefore, the applicant should not be exposed to further court's proceedings (see para 16).

(3) The PSA was supported by a majority of creditors and it was only prudent and fair that it be allowed to be implemented. There was also no cogent reasons to suspect that the PSA was not a bona fide scheme only forwarded by the applicant to escape liabilities and claims from creditors. There were sufficient details and explanations outlined to indicate that the PSA indeed was a viable and good scheme proposed for the benefit of all (see paras 17–18).

(4) There was no undue delay in proposing the PSA and this court accepted the necessities and reasons for time taken in presenting the same to Bursa. There was a need for time as the PSA was quite comprehensive detailing the scheme for acceptance by the authorities concerned. Although previous application for previous ROs may have been correctly refused, there was sufficient reasons for the RO now to be applied. Past considerations refusing the same must be tempered with the current position that should acknowledge the availability of the PSA now. The PSA should be given the chance to see that it be successfully implemented and therefore there should be an order to restrain proceedings in any action against the applicant (see paras 19–20).

(5) It would only be wise and fair to all parties concerned including the creditors, based on the facts of the present case to allow the application of the RO at least for one final time. This would allow an opportunity for the scheme to at least be rightly considered for its implementation. An RO denied now would only mean the applicant would be further put in a position of difficulty in trying to address the interest of all parties in its present challenging financial position. In this regard, it would not benefit anyone if the RO is not granted (see para 26).

[Bahasa Malaysia summary

Permohonan pemohon adalah untuk perintah sekatan ('PS') untuk 90 hari di bawah s 176(10) Akta Syarikat 1965 ('Akta') untuk menyekat prosiding dalam apa-apa tindakan terhadap syarikat kecuali dengan kebenaran mahkamah. Pemohon telah mendapatkan perintah mahkamah menurut s 176(1) Akta untuk mencadangkan penyelesaian hutang melalui skim susunan yang dicadangkan ('PSA'). PSA telah dikemukakan kepada pemiutang syarikat dan

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majoriti daripada pemiutang bersetuju dengan terma-terma PSA. Setelah mendapatkan kebenaran daripada majoriti pemiutang, pemohon memohon untuk PS pertama tetapi dua pemiutang, iaitu Ambank (M) Bhd dan Boon Wah Air Conditioning Engineering Sdn Bhd telah membantah kepada permohonan itu dan permohonan itu telah ditolak oleh mahkamah. Pemohon meneruskan untuk memohon kepada Mahkamah Rayuan tetapi mehkamah telah menolak rayuan kerana ia telah diputuskan peruntukan s 176(10A)(c) dan (10A)(d) Akta tidak dipatuhi. Pemohon kemudian memohon untuk PS kedua dan ini telah dibenarkan. Adalah hujahan pemohon bahawa terdapat kerperluan untuk PS sekarang kerana walaupun PSA telah diluluskan oleh pemiutang, pemohon memerlukan waktu untuk memastikan projek-projek yang akan didapatkan di bawah pelan regularisasi yang dicadangkan ('PRP'). Tanpa ini, PRP tidak dapat diserahkan kepada Bursa. Bagi tujuan ini, pelbagai e-mel yang berkaitan telah diekshibitkan oleh pemohon menunjukkan usaha dalam memastikan projek-projek untuk PRP tersebut. Usaha juga turut dibuat berkenaan dengan pelantikan pihak-pihak relevan dalam menyiapkan serahan kepada Bursa. Usaha-usaha tersebut termasuk pelantikan peguamcara dan akauntan untuk pelaksanaan usaha wajar dan usaha ini masih berjalan. Pelantikan pengarah untuk memenuhi keperluan s 176(10A)(d) Akta juga telah dimuktamadkan. Kebenaran dan sokongan daripada majoriti pemiutang telah diperolehi bagi permohonan PS dan pelantikan pengarah.

Diputuskan, membenarkan permohonan:

(1) Permohonan tersebut bukanlah pelanjutan PS tetapi merupakan permohonan baru atas perkara yang sama. Ini dapat dilihat dengan jelas dalam saman pemula yang difailkan oleh pemohon dengan perkataan 'tempoh lanjutan' dipotong. Mahkamah telah memerintahkan agar perkataan-perkataan tersebut dipotong (lihat perenggan 15).

(2) Memang terdapat faedah PSA dan PRP yang harus dipertimbangkan secara keseluruhan dan munasabah diikuti oleh defendan. PSA dan PRP itu bukan sahaja untuk faedah kepada pemohon tetapi kepada pemiutang secara menyeluruh dan oleh itu, pemohon tidak sepatutnya didedahkan selanjutnya kepada prosiding mahkamah (lihat perenggan 16).

(3) PSA disokong oleh majoriti pemiutang dan ia adalah wajar dan adil agar ia dibenarkan untuk dilaksanakan. Juga tidak terdapat alasan yang jelas dan menyakinkan untuk mensyaki PSA tersebut bukanlah skim bona fide hanya dikemukakan oleh pemohon untuk melepaskan liabiliti dan menuntut daripada pemiutang. Terdapat butir-butir mencukupi dan penjelasan digariskan yang menandakan bahawa PSA sememangnya berdaya maju dan skim baik yang dicadangkan untuk manfaat semua (lihat perenggan 17–18).

(4) Tiada kelengahan tidak wajar dalam mencadangkan PSA dan mahkamah

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menerima keperluan dan sebab-sebab untuk masa yang diambil dalam menyampaikan yang sama kepada Bursa. Terdapat keperluan kepada masa memandangkan PSA adalah agak menyeluruh membutirkan skim untuk penerimaan pihak-pihak berkuasa yang berkenaan. Walaupun permohonan terdahulu untuk PS terdahulu telah dengan betul ditolak, terdapat sebab-sebab mencukupi untuk PS sekarang dipohon. Pertimbangan dahulu yang menolaknya mestilah diperkuat dengan kedudukan sekarang yang harus mengakui terdapatnya PSA sekarang. PSA tersebut hendaklah diberi peluang untuk dilaksanakan dengan jayanya dan oleh itu patut terdapat perintah sekatan prosiding dalam apa-apa tindakan terhadap pemohon (lihat perenggan 19–20).

(5) Ia akan hanya bijak dan adil kepada semua pihak-pihak berkenaan termasuk pemiutang, berdasarkan fakta kes ini untuk membenarkan permohonan PS sekurang-kurangnya untuk satu kali terakhir. Ini akan memberi peluang kepada skim untuk setidak-tidaknya dipertimbangkan dengan betul bagi pelaksanaannya. PS yang dinafikan akan hanya bermakna pemohon akan diletakkan dalam kedudukan yang sukar untuk menyampaikan kepentingan semua pihak dalam kedudukan kewangannya yang mencabar ini. Berkaitan hal ini, ia tidak akan memanfaatkan sesiapa jika PS tersebut tidak diberikan (lihat perenggan 26).]

Cases referred to

Jin Lin Wood Industries Sdn Bhd & Ors v Mulpha International Bhd [2005] MLJU 326; [2005] 7 CLJ 208, HC (refd)

Kuala Lumpur Industries Bhd & Ors, Re [1990] 2 MLJ 180; [1991] 3 CLJ (Rep) 86, HC (refd)

Lityan Holdings Berhad and Others [2007] MLJU 66; [2007] 3 CLJ 554, HC (refd)

Legislation referred to

Companies Act 1965 s 176, 176(1), (10), (10A)(c), (d)

PY Chong (Alif Ridwan Mohd with him) (Kamaruzaman Arif, Amran & Chong) for the applicant.

Malcom Fernandez (Amnah Samsul Bahrin with him) (C Sukumaran & Co) for the first intervener.

Peter Douglas Ling (Emile Van Burl with him) (Peter Ling & Co) for the second intervener.

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Abu Bakar Jais JC:

MATERIAL FACTS

[1] The application of the applicant here vide the originating summons ('the OS') is for restraining order ('the RO') for 90 days under s 176(10) of the Companies Act 1965 ('the Act'). The order requested is to restrain proceedings in any action against the company except with the leave of the court. At the outset for convenience, the provisions of s 176 of the Act are sets out here and it states:

> (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.
>
> (2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned from time to time if the resolution for adjournment is approved by a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting.
>
> (3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.
>
> (4) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.
>
> (5) An order under subsection (3) shall have no effect until an office copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such either earlier date as the Court may determine and as may be specified in the order.
>
> (6) Subject to subsection (7), a copy of every order made under subsection (3) shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

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(7) The Court may, by order, exempt a company from compliance with the requirements of subsection (6) or determine the period during which the company shall so comply.

(8) Where any such compromise or arrangement (whether or not for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies has been proposed, the directors of the company shall –

(a) if a meeting of the members of the company by resolution so directs, instruct such accountants or advocates or both as are named in the resolution to report on the proposals and forward their report or reports to the directions as soon as may be; and

(b) make the report or reports available at the registered office of the company for inspection by the shareholders and creditors of the company at least seven days before the date of any meeting ordered by the Court to be summoned as provided in subsection (1).

(9) Every company which makes default in complying with subsection (6) or (8) and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Two thousand ringgit.

Power of Court to restrain proceedings.

(10) Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceeding in any action or proceeding against the company except be leave of the Court and subject to such terms as the Court imposes.

(10A) The Court may grant a restraining order under subsection (10) to a company for a period of not more than ninety days or such longer period as the Court may for good reason allow if and only if –

(a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

(b) the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members pursuant to subsection (1);

(c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) it approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if

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A that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

(10B) The person approved or appointed by the Court to act as director of the company under subsection (10A) shall have a right of access at all reasonable times to accounting and other records (including registers) of the company, and is entitled to require from any officer of the company such information and explanation as he may require for the purpose of his duty.

(10C) Any disposition of the property of the company, including things in action and any acquisition of property by the company, other than those made in the ordinary course of business, made after the grant of the restraining order by the Court shall, unless the Court otherwise orders, be void.

(10D) Where a company disposes or acquires any property, other than in the ordinary course of its business, without leave of the Court, every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or one million ringgit or both.

(10E) Where an order is made under subsection (10), every company in relation to which the order is made shall, within seven days –

(a) lodge an office copy of the order with the Registrar; and

(b) publish a notice of the order in a daily newspaper circulating generally throughout Malaysia,

and every company which makes default in complying with this subsection and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: One hundred thousand ringgit.

(10F) An order made by the Court under subsection (10) shall not have the effect of restraining further proceeding in any action or proceeding against any person other than the company that had applied for the restraining order.

(10G) For the purpose of subsection (10F), the term 'any person' includes a guarantor of the company.

[2] Vide Summons No 24–NCC-3–01 of 2013 the applicant had on 22 February 2013 obtained an order of court pursuant to s 176(1) of the Act to propose a debt settlement through a proposed scheme of arrangement ('the PSA'). This PSA had been presented to the company's creditors and majority of these creditors had agreed to the terms of the PSA.

[3] Having obtained the consent of majority of the creditors, the applicant vide Summons No 24–NCC-126–04 of 2013 applied for the first RO but two creditors, Ambank (M) Bhd and Boon Wah Air Conditioning Engineering Sdn Bhd objected to this application and on 21 May 2013 this application was

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dismissed by the court. The applicant thereafter appealed to the Court of Appeal but the same dismissed the appeal on 10 September 2013 as it was decided the provisions of s 176(10A)(c) and (d) of the Act was not adhered to.

[4] The applicant then applied for the second RO and this was granted on 16 August 2013 and the RO was with effect until 14 November 2013.

THE APPLICANT'S SUBMISSION

[5] Based on the above facts, the applicant says there is a need for the RO now as although the PSA was approved by the creditors, the applicant needed time to ensure the projects that will be obtained under the proposed regularisation plan ('the PRP') (para 10 of the applicant's affidavit). Without this the PRP could not be submitted to Bursa. Towards this end various relevant e-mails were exhibited by the applicant showing efforts in ensuring the projects for the PRP.

[6] Efforts were made also with regard to the appointment of relevant parties in preparing for the submission to Bursa. These efforts include the appointment of solicitors and accountants for due diligence exercise and these efforts at this stage is still on-going. The appointment of a director to satisfy the requirement of s 176(10A)(d) of the Act is also finalised. On 19 June 2013 to the consent and support of the majority creditors were obtained for the application of the RO and the appointment of the director.

[7] The applicant submits the RO is needed for three months towards finalising the requirements for the submission to Bursa.

THE FIRST INTERVENER'S SUBMISSION

[8] The first intervener Ambank (M) Bhd, opposes this application and filed three affidavits and the summary of this opposition as seen from the affidavits is as follows.

[9] From the time of the meeting until now, the applicant failed to take the necessary steps in realising the PSA. In fact the applicant in its application is dragging its feet towards the implementation of the PSA.

[10] There is no cogent reasons for the application of the RO now as the previous application for RO had rightly been rejected.

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A THE SECOND INTERVENER'S SUBMISSION

[11] In resisting this application the second intervener's Boon Wah Air Conditioning Engineering Sdn Bhd, gist of submission as seen in its affidavit is narrated as follows.

B

[12] The second RO obtained on 16 August 2013 as indicated earlier was set aside on 3 December 2013. As this RO was already set aside there is no basis for the application of another RO now.

C

[13] There is still no extension of time granted by Bursa for the applicant's submission for its PRP and the application for extension of time to Bursa by the applicant was only made on 18 November 2013.

D **[14]** Also in getting the consent of the creditors only a few creditors gave such consent and this fact is prejudicial to the second intervener.

THE COURT'S FINDINGS

E **[15]** First it is the finding of this court the application here is not an extension of an RO but a fresh application of the same. This is clearly seen in the OS as filed by the applicant with the words 'tempoh lanjutan' (extended time) deleted. This court had also ordered that words to be deleted.

F

[16] Second there is indeed a viable PSA and PRP that ought to be considered favourably and rightly pursued by the applicant. The PSA and PRP would not only be for the benefit of the applicant but to the creditors as a whole and therefore the applicant should not be exposed to further court's

G proceedings.

[17] Third it is also a finding of this court the PSA is supported by a majority of creditors and it is only prudent and fair that it be allowed to be implemented.

H **[18]** Fourth there is no cogent reasons to suspect that the PSA is not a bona fide scheme only forwarded by the applicant to escape liabilities and claims from creditors. There are sufficient details and explanations outlined to indicate that the PSA indeed is a viable and good scheme proposed for the benefit of all.

I

[19] Fifth this court is also of the finding that there is no undue delay in proposing the PSA and this court accepts the necessities and reasons for time taken in presenting the same to Bursa. There is a need for time as the PSA is

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quite comprehensive detailing the scheme for acceptance by the authorities concerned.

[20] Further this court also is of the finding although previous application for previous ROs may have been correctly refused, there is sufficient reasons for the RO now to be applied. Past considerations refusing the same must be tempered with the current position that should acknowledge the availability of the PSA now. In this regard the PSA should be given the chance to see that it be successfully implemented and therefore there should be an order to restrain proceedings in any action against the applicant.

[21] Last but not least, this court also accepts that the director named now in order to satisfied the requirement of s 176(10A)(d) of the Act should be approved as there is no reasons that could be advanced to challenge the named director. Indeed no party had attempted to challenge or question the same.

[22] In deciding to allow the application of the applicant now, this court has taken into account some case law on the operation of s 176 of the Act and the considerations that had been applied on similar applications as decided in the case law.

[23] The first case is the case of *Re Kuala Lumpur Industries Bhd & Ors* [1990] 2 MLJ 180; [1991] 3 CLJ (Rep) 86 where it states:

> For there to be a proposal within the meaning of s 176, it is not necessary that there should be a scheme in a complete form capable of being presented to the creditors for being voted on Where there is such a proposal, and even before it is put to anybody, the company or any member or creditor of the company may move the court for a restraining order pursuant to s 176(10). The policy of the section is not such that a s 176(10) application has to be tagged on to a s 176(1) application. The two may be brought independent of the other.

[24] Also relevant is the case of *Lityan Holdings Berhad and Others* [2007] MLJU 66; [2007] 3 CLJ 554 where it is held:

> A restraining order could not be made under s 176(10) of the Companies Act 1965 based merely on facts stated in the supporting affidavit of the plaintiffs. The granting of a restraining order is a serious matter that involves the interest of shareholders and creditors of the company. Firstly, before a restraining order can be granted under s 176(10) there must be in place a proposed 'compromise or arrangement between the plaintiff and its creditors, or any class of them or between the company and its members or any class of them'. Secondly, the company must be able to present a viable proposal for the consideration of the court supported by views of experts.

[25] In *Jin Lin Wood Industries Sdn Bhd & Ors v Mulpha International*

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Bhd [2005] MLJU 326; [2005] 7 CLJ 208 where at held [2] and [3] it states:

> The restraining order needed to be extended so that the scheme would not be defeated by the filing of legal suits. If legal suits were to get in the way, all the effort, preliminary discussions and liaising with the relevant authorities to fulfil all the legal requirements would come to naught. As far as the authorities were concerned, the Securities Commission had asked for and had obtained information regarding the restructuring. The Ministry of International Trade and Industry (MITI) had said that in principle, they had no objections to the scheme.
>
> The mere exclusion of a certain creditor does not open the applicants to imputations of mala fides and abuse of process. Under s 176(1), the applicants have the discretion not to compromise with all creditors and the rights of the remaining creditors are merely stayed. Further, there was no reason to worry about being left out in the cold as there were sufficient safeguards under the provisions of the Companies Act 1965, for instance ss 176(10B), (10C), (10D), (10F) and (10G) that provide stringent penalties for violators.

[26] Taking note of what are decided by these cases, this court is of the considered opinion that it would only be wise and fair to all parties concerned including the creditors, based on the facts of the present case to allow the application of the RO at least for one final time. This would allow an opportunity for the scheme to at least be rightly considered for its implementation. An RO denied now would only mean the applicant would be further put in a position of difficulty in trying to address the interest of all parties in its present challenging financial position. In this regard it would not benefit anyone if the RO is not granted.

DECISION

[27] Based on the foregoing the RO is granted for 90 days from today together with the related ancillary orders requested in the OS.

Application allowed.

Reported by Afiq Mohamad Noor